



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2016-0574; FRL-9974-12-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Removal of Clean Air Interstate Rule Trading Programs Replaced by Cross-State Air Pollution Rule Trading Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving state implementation plan (SIP) revisions submitted by the State of West Virginia. These revisions pertain to two West Virginia regulations that established trading programs under the Clean Air Interstate Rule (CAIR). The EPA-administered trading programs under CAIR were discontinued on December 31, 2014 upon the implementation of the Cross-State Air Pollution Rule (CSAPR), which was promulgated by EPA to replace CAIR. CSAPR established federal trading programs for sources in multiple states, including West Virginia, that replace the CAIR state and federal trading programs. The submitted SIP revisions request removal of state regulations that implemented the CAIR annual nitrogen oxide (NO_x) and annual sulfur dioxide (SO₂) trading programs from the West Virginia SIP (as CSAPR has replaced CAIR). EPA is approving these SIP revisions in accordance with the requirements of the Clean Air Act (CAA). West Virginia's SIP revision submittal requesting removal of a state regulation that implemented the CAIR ozone season NO_x trading program will be addressed in a separate action.

DATES: This final rule is effective on **[insert date 30 days after date of publication in the**

Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2016-0574. All documents in the docket are listed on the [http:// www.regulations.gov](http://www.regulations.gov) website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <http://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814-2308, or by e-mail at powers.marilyn@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In 2005, EPA promulgated CAIR (70 FR 25162, May 12, 2005) to address transported emissions that significantly contributed to downwind states’ nonattainment and interfered with maintenance of the 1997 ozone and fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS). CAIR required 28 states, including West Virginia, to revise their SIPs to reduce emissions of NO_x and SO₂, precursors to the formation of ambient ozone and PM_{2.5}. Under CAIR, EPA provided model state rules for separate cap and trade programs for annual NO_x, ozone season NO_x, and annual SO₂. The annual NO_x and annual SO₂ trading programs were designed to address transported PM_{2.5} pollution, while the ozone season NO_x trading program was designed to address transported ozone pollution. EPA also promulgated CAIR federal

implementation plans (FIPs) with CAIR federal trading programs that would address each state's CAIR requirements in the event that a CAIR SIP for the state was not submitted or approved (71 FR 25328, April 28, 2006). Generally, both the model state rules and the federal trading program rules applied only to electric generating units (EGUs), but in the case of the model state rule and federal trading program for ozone season NO_x emissions, each state had the option to submit a CAIR SIP revision that expanded applicability to include certain non-EGUs that formerly participated in the NO_x Budget Trading Program under the NO_x SIP Call.¹ West Virginia submitted, and EPA approved, a CAIR SIP revision based on the model state rules establishing CAIR state trading programs for annual SO₂, annual NO_x, and ozone season NO_x emissions, with certain non-EGUs included in the state's CAIR ozone season NO_x trading program. *See* 74 FR 38536 (August 4, 2009).

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR in 2008, but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR. *North Carolina v. EPA*, 550 F.3d 1176 (Dec. 23, 2008). The ruling allowed CAIR to remain in effect temporarily until a replacement rule consistent with the Court's opinion was developed. While EPA worked on developing a replacement rule, the CAIR program continued as planned with the NO_x annual and ozone season programs beginning in 2009 and the SO₂ annual program beginning in 2010.

On August 8, 2011 (76 FR 48208), acting on the D.C. Circuit's remand, EPA promulgated CSAPR to replace CAIR in order to address the interstate transport of emissions contributing to nonattainment and interfering with maintenance of the two air quality standards covered by

¹ In October 1998, EPA finalized the "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone"—commonly called the NO_x SIP Call. *See* 63 FR 57356 (October 27, 1998).

CAIR as well as the 2006 PM_{2.5} NAAQS. CSAPR required EGUs in affected states, including West Virginia, to participate in federal trading programs to reduce annual SO₂, annual NO_x, and/or ozone season NO_x emissions. The rule also contained provisions that would sunset CAIR-related obligations on a schedule coordinated with the implementation of the CSAPR compliance requirements. CSAPR was to become effective January 1, 2012; however, the timing of CSAPR's implementation was impacted by a number of court actions.

Numerous parties filed petitions for review of CSAPR in the D.C. Circuit, and on December 30, 2011, the D.C. Circuit stayed CSAPR prior to its implementation and ordered EPA to continue administering CAIR on an interim basis. On August 21, 2012, the court issued its ruling, vacating and remanding CSAPR to EPA and ordering continued implementation of CAIR. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 38 (D.C. Cir. 2012). The D.C. Circuit's vacatur of CSAPR was reversed by the United States Supreme Court on April 29, 2014, and the case was remanded to the D.C. Circuit to resolve remaining issues in accordance with the Supreme Court's ruling. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). On remand, the D.C. Circuit affirmed CSAPR in most respects but remanded certain state emissions budgets, including the Phase 2 ozone season NO_x budget for West Virginia. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015).

Throughout the initial round of D.C. Circuit proceedings and the ensuing Supreme Court proceedings, the stay on CSAPR remained in place, and EPA continued to implement CAIR. Following the April 2014 Supreme Court decision, EPA filed a motion asking the D.C. Circuit to lift the stay in order to allow CSAPR to replace CAIR in an equitable and orderly manner while further D.C. Circuit proceedings were held to resolve remaining claims from petitioners. Additionally, EPA's motion requested delay, by three years, of all CSAPR compliance deadlines

that had not passed as of the approval date of the stay. On October 23, 2014, the D.C. Circuit granted EPA's request, and on December 3, 2014 (79 FR 71663), in an interim final rule, EPA set the updated effective date of CSAPR as January 1, 2015 and delayed the implementation of CSAPR Phase I to 2015 and CSAPR Phase 2 to 2017. In accordance with the interim final rule, EPA stopped administering the CAIR state and federal trading programs with respect to emissions occurring after December 31, 2014, and EPA began implementing CSAPR on January 1, 2015.²

In October 2016, EPA promulgated the CSAPR Update (81 FR 74504, Oct. 26, 2016). In the CSAPR Update, EPA responded to the remand of West Virginia's Phase 2 ozone season NO_x budget by withdrawing the requirement for West Virginia EGUs to participate, after 2016, in the original CSAPR ozone season NO_x trading program, which had addressed the state's transport obligations with respect to the 1997 ozone NAAQS and required the state's EGUs to participate starting in 2017 in a new CSAPR ozone season NO_x trading program to address (in part) the state's transport obligations with respect to the 2008 ozone NAAQS.

As noted above, starting in January 2015, the CSAPR federal trading programs for annual NO_x, ozone season NO_x and annual SO₂ were applicable in West Virginia. Thus, since January 1, 2015, EPA has not administered the CAIR state trading programs for annual NO_x, ozone season NO_x, or annual SO₂ emissions established by the West Virginia regulations.

On July 13, 2016, the State of West Virginia, through the West Virginia Department of Environmental Protection (WVDEP), submitted three SIP revisions requesting EPA to remove from its SIP three regulations that implemented the CAIR state trading programs: Regulation

² EPA solicited comment on the interim final rule and subsequently issued a final rule affirming the amended compliance schedule after consideration of comments received. 81 FR 13275 (March 14, 2016).

45CSR39 – Control of Annual Nitrogen Oxides Emissions, Regulation 45CSR40 – Control of Ozone Season Nitrogen Oxides Emissions, and Regulation 45CSR41 – Control of Annual Sulfur Dioxide Emissions. On September 25, 2017 (41 FR 44525), EPA published a direct final rulemaking notice (DFRN) for the State of West Virginia. In the DFRN, EPA approved the West Virginia SIP submittals requesting removal of Regulation 45CSR39 and Regulation 45CSR41 from the West Virginia SIP, and explained that it would take separate action on Regulation 45CSR40 at a future date. On the same date (41 FR 44544), EPA published a notice of proposed rulemaking (NPR) for the removal action. EPA published the DFRN without prior proposal because the Agency viewed the submittals as noncontroversial and anticipated no adverse comments. EPA explained that if adverse comments were received during the comment period, the DFRN would be withdrawn and all public comments received would be addressed in a subsequent final rule based on the September 25, 2017 proposed rule. EPA received an adverse comment, and on December 12, 2017 (82 FR 58341), withdrew the DFRN.

II. Summary of SIP Revision and EPA Analysis

WVDEP submitted two SIP revisions on July 13, 2016 that requested the removal from the West Virginia SIP of the State's regulations (45CSR39 and 45CSR41) which implemented respectively West Virginia's state CAIR annual NO_x and annual SO₂ trading programs. As noted previously, the CAIR annual NO_x and SO₂ reduction programs addressed interstate transport of emissions for the 1997 PM_{2.5} NAAQS. The D.C. Circuit remanded CAIR to EPA for replacement, and in response EPA promulgated CSAPR which, among other things, fully addresses West Virginia's interstate transport obligations with regard to the 1997 PM_{2.5} NAAQS. *See* 76 FR at 48210. Once the transport obligations formerly addressed through the CAIR trading programs began to be addressed through implementation of the CSAPR trading

programs in January 2015, EPA stopped administering the CAIR trading programs, including West Virginia's state CAIR annual NO_x and SO₂ programs created by 45CSR39 and 45CSR41. Consequently, these two state rules no longer play any role in remedying the transport obligation that the state adopted them to address, which is now being met through other rules. Further, these two state rules do not serve any other purpose (such as helping to address requirements for certain non-EGUs under the NO_x SIP Call). Therefore, EPA determines it is appropriate for these two state regulations implementing CAIR to be removed in their entirety from the West Virginia SIP.

III. Public Comments and EPA Responses

One commenter submitted two comments on the proposed approval of WVDEP's July 13, 2016 submittals requesting removal of Regulations 45CSR39 and 45CSR41 from the West Virginia SIP.

Comment 1: The commenter stated that EPA can only remove the CAIR NO_x annual and SO₂ annual trading programs at the same time as the NO_x ozone season program, and EPA cannot remove two of the three programs without adequately explaining why these programs can be removed separately.

EPA Response to Comment 1: West Virginia's regulations that implemented the CAIR trading programs were established in three separate regulations: Regulation 45CSR39 – Control of Annual Nitrogen Oxides Emissions, Regulation 45CSR40 – Control of Ozone Season Nitrogen Oxides Emissions, and Regulation 45CSR41 – Control of Annual Sulfur Dioxide Emissions. These regulations were designed to allow West Virginia to participate in the regional trading programs administered by EPA to meet the requirements of CAIR. The regional trading

programs under CAIR were separate trading programs for annual NO_x, ozone season NO_x, and annual SO₂, and affected states had the flexibility to participate in one or more of the trading programs. Adoption of one of the trading programs in a SIP was not dependent on adoption of any of the other trading programs into the state's SIP, and each is therefore severable from one another. West Virginia submitted three stand-alone SIP submittals on July 13, 2016, each submittal requesting removal of one of the three CAIR regulations from the West Virginia SIP. As these were three separate submittals to remove separate state regulations for separate regional trading programs, EPA can take independent action on each of the submittals in accordance with section 110 of the CAA. The commenter has not cited any authority that precludes EPA from taking such independent actions, or any harm that would arise from EPA's approval of West Virginia's of the CAIR NO_x annual and SO₂ annual trading programs separate from the NO_x ozone season trading program.

Comment 2: The commenter also stated that EPA cannot simply say that the removals are in accordance with section 110(l) of the CAA, but needs to explain how the removals meet the section 110(l) requirements.

EPA Response to Comment 2: Regarding the commenter's concerns with respect to the requirements of CAA section 110(l), as noted previously in this rulemaking and in the DFRN, EPA is no longer administering the CAIR trading programs for annual NO_x and SO₂, including West Virginia's State CAIR programs created by 40CSR39 and 40CSR41. Because the State CAIR trading programs created by these rules are no longer being implemented, and because the rules serve no other purpose, removal of the rules from the SIP does not interfere with any applicable requirement concerning attainment or any other requirement of the CAA.

IV. Final Action

EPA is approving the two July 13, 2016 West Virginia SIP revision submissions which seek removal from the West Virginia SIP of Regulation 45CSR39 that implemented the CAIR annual NO_x trading program and Regulation 45CSR41 that implemented the CAIR annual SO₂ trading program. Removal of these two regulations from the West Virginia SIP is in accordance with section 110 of the CAA.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule removing West Virginia regulations 45CSR39 and 45CSR41 from the West Virginia SIP does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days after date of publication in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action removing West Virginia regulations 45CSR39 and 45CSR41 may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: January 25, 2018.

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart XX--West Virginia

§ 52.2520 [Amended]

2. In § 52.2520, the table in paragraph (c) is amended by:

- a. Removing the table heading “[45 CSR] Series 39 Control of Annual Nitrogen Oxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Nitrogen Oxides” and the entries “Section 45-39-1” through “Section 45-39-90”;
- b. Removing the table heading “[45 CSR] Series 41 Control of Annual Sulfur Dioxides Emissions” and the entries “Section 45-41-1” through “Section 45-41-90”.

[FR Doc. 2018-02463 Filed: 2/7/2018 8:45 am; Publication Date: 2/8/2018]